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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

CHRIS DAVID SMITH,

Defendant and Appellant.

D074901

(Super. Ct. No. SWF1707369)

APPEAL from a judgment of the Superior Court of Riverside County, Jorge C. Hernandez, Judge. Affirmed.

Richard Schwartzberg, under appointment by the Court of Appeal, on behalf of Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, A. Natasha Cortina, and Lynne G. McGinnis, Deputy Attorneys General, for Plaintiff and Respondent.

Chris David Smith asks us to reverse his conviction for assault with a deadly weapon because the jury instructions included the "inherently deadly" alternative for

deadly or dangerous weapons, which was not applicable. We conclude the inclusion of the alternative was harmless error and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Smith and Raymond C. met sometime in January 2017, when Raymond was visiting friends at the homeless encampment where Smith lived. On May 21, 2017, Raymond was visiting someone at the encampment when he saw Smith holding a hatchet, accompanied by a woman and her four- or five-year old daughter. Raymond thought the woman looked scared; he yelled to Smith to ask what Smith was doing, and Smith told him to leave. Raymond refused to leave until he knew the woman and child were safe. Smith exited his campsite holding a double-sided hatchet, and Raymond retreated. Raymond retrieved a family heirloom sword he had brought with him to keep safe from family and hidden in some bushes; he then returned to Smith's campsite to check on the woman and her child. Smith exited the campsite again, this time with a machete in one hand. Raymond backed away from Smith, who told him, "I'm coming for you."

Raymond returned to the homeless encampment the next morning. He sat down on a car seat and passed out. He awoke with Smith standing over him, holding a machete. Smith struck Raymond in the left arm with the machete, sending Raymond tumbling backwards. Smith swung a second time, missing Raymond, and hitting the ground near the back of Raymond's head. Raymond hit Smith in the face with his elbow, kicked Smith, and ran. Smith followed after Raymond, who ran out of the encampment and into traffic on Grand Avenue, with blood dripping from his arm, screaming that he had been stabbed and to call 9-1-1.

Bystanders testified at trial that Smith threw an object he held in his hand into a nearby field. They described the object in Smith's hand variously as a long, shiny metal object, a huge metal stick, a pole, and a sword.

Raymond told paramedics that he was cut with a machete and admitted to using .2 grams of Methamphetamine around 4:00 p.m. the afternoon before. He suffered a full thickness laceration to his left arm, which means all the layers, including the muscle, were cut.

Deputy sheriffs searched the area where Smith was found and collected two knives from nearby bushes. The knives were in sheathes, and neither was bloodied. A sword was recovered later. The California Department of Justice Crime Lab tested one of the knives and the sword for blood. A small area on the blade of the sword and on the sheath tested positive for blood, but no DNA testing was conducted. There was no blood detected on the knife or its sheath.

Smith was charged with attempted willful, premeditated and deliberate murder (Pen. Code,¹ §§ 187, subd. (a), 664; count 1) and assault with a deadly weapon (§ 245, subd. (a)(1); count 2). He also was charged with using a deadly and dangerous weapon (§ 1192.7, subd. (c)(23)) and with personally inflicting great bodily injury upon the victim (§§ 1192.7, subd. (c)(8), 12022.7, subd. (a)).

The parties agreed to the jury instructions, which included CALCRIM No. 875, a standard jury instruction for assault with a deadly weapon, and CALCRIM No. 3145, for

¹ Further section references are to the Penal Code.

the enhancement for personal use of a deadly weapon. The court instructed the jury that to prove Smith was guilty of assault with a deadly weapon other than a firearm, the People must prove that the defendant acted with a deadly weapon other than a firearm "that by its nature would directly and probably result in the application of force to a person" and that the defendant must have "had the present ability to apply force with a deadly weapon other than a firearm to a person." The court defined "deadly weapon other than a firearm" as "any object, instrument or weapon that is inherently deadly or one that is used in such a way that it is capable of causing and likely to cause death or great bodily injury." In the context of the additional allegation that the defendant personally used a deadly or dangerous weapon during the commission of a charged offense, the court explained: "A deadly or dangerous weapon is any object, instrument, or weapon that is inherently deadly or dangerous or one that is used in such a way that it is capable of causing and likely to cause death or great bodily injury."

During closing arguments, the prosecutor told the jury that the first element of assault with a deadly weapon was met because "the machete is a deadly weapon, and the act is the swinging at [Raymond]'s head and neck area. [¶] . . . If you swing a machete at somebody's head, that is directly and probably going to make that machete hit that person's head." He also said, "And, of course, a deadly weapon is any object, instrument, or weapon that is inherently deadly or dangerous. A machete is deadly or dangerous. Those elements are satisfied as well." The defense argued in closing that Raymond was an unreliable witness in part because he was "on a drugged out binge," Smith was not the perpetrator, and there was no machete.

The jury convicted Smith of count 2, felony assault with a deadly weapon (§ 245, subd. (a)(1)), as well as the enhancement for personally inflicting great bodily injury upon the victim (§§1192.7, subds. (c)(8) & (c)(23)). It also found that Smith personally used a deadly or dangerous weapon in the commission of the assault. The court sentenced Smith to prison for a total term of seven years. Smith timely appealed.

DISCUSSION

We review an assertion of instructional error de novo. (*People v. Hernandez* (2013) 217 Cal.App.4th 559, 568.) The parties agree a machete is not an inherently dangerous weapon; thus, while CALCRIM Nos. 875 and 3145 generally are correct statements of law (see *People v. Velasquez* (2012) 211 Cal.App.4th 1170, 1176 (*Velasquez*)), referencing an inherently dangerous weapon during jury instructions was error in this instance. At issue is whether the error is legal in nature or factual in nature and what the standard for determining prejudicial error should be used.

An instruction contains a legal error when it includes an incorrect statement of law; a factual error exists when an otherwise valid legal theory is not supported by the facts or evidence in the case. (*People v. Guiton* (1993) 4 Cal.4th 1116, 1125.) It is legally correct to state an object may be either inherently deadly or deadly as used (*Velasquez, supra*, 211 Cal.App.4th at p. 1176) because some objects, like dirks and blackjacks, are inherently deadly as a matter of law (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1029), while others, like knives and box cutters, are not. (*People v. Kersey* (1957) 154 Cal.App.2d 364, 366 [knives]; *People v. McCoy* (1944) 25 Cal.2d 177, 188 [box cutters] (*McCoy*).)

There were no eyewitnesses to the incident between Smith and Raymond, so there is some dispute here over what weapon was used to cut Raymond. Bystanders who saw the two men after Raymond was cut saw Smith with knives and an object they described as a stick, a pole, or a sword. The charging document identifies the deadly weapon as a knife, but the verdict forms do not specifically identify the dangerous or deadly object.

"Inherently deadly or dangerous" weapons are objects that are deadly or dangerous in "the ordinary use for which they are designed," meaning they lack any practical, nondeadly purpose. (*People v. Perez* (2018) 4 Cal.5th 1055, 1065.) While there is no case law that expresses whether a family heirloom sword or a machete is a deadly or dangerous weapon as a matter of law, both objects are commonly used for nondeadly purposes—one as a decoration and the other to clear brush.² Moreover, regardless of the specific weapon used, neither party contends on appeal that it was inherently dangerous. Thus, the inclusion of reference to inherently dangerous weapons in the jury instructions was a legal error. (See, e.g., *People v. Stutelberg* (2018) 29 Cal.App.5th 314, 319 (*Stutelberg*); *People v. Aledamat* (2018) 20 Cal.App.5th 1149, 1154, review granted July 5, 2018, S248105 (*Aledamat*).)³

² To the extent a machete is properly defined as a large knife, as Smith characterizes it, it is not inherently dangerous as a matter of law. (*McCoy, supra*, 25 Cal.2d at p. 188.)

³ The Supreme Court granted review in *Aledamat* to address the standard for evaluating prejudice resulting from a legal error. While we agree with *Aledamat* that this type of error is legal in nature, we disagree on the appropriate standard for prejudice, and we cite *Aledamat* solely for its persuasive value. (Cal. Rules of Court, rule 8.1115(e)(1).)

Although the portion of the jury instructions referencing inherently deadly or dangerous objects was erroneous, we conclude the error was not prejudicial. Smith asks us to adopt the standard for harmlessness employed in *Aledamat*, which requires reversal when "there is no basis in the record for concluding that the jury relied on the alternative definition of 'deadly weapon' (that is, the definition looking to how a noninherently dangerous weapon was actually used)." (*Aledamat, supra*, 20 Cal.App.5th at p. 1154.) We decline to do so.

The Supreme Court recently held that an error in instructions on the elements of a crime is harmless "so long as the error does not vitiate *all* of the jury's findings," meaning it would be harmless error if it were "clear beyond a reasonable doubt that a rational jury would have rendered the same verdict absent the error." (*People v. Merritt* (2017) 2 Cal.5th 819, 829, 831.) It also held that offering an instruction on an invalid legal theory may be harmless when " ' other aspects of the verdict or the evidence leave no reasonable doubt that the jury made findings necessary' " to convict the defendant under the alternative, valid legal theory. (*In re Martinez* (2017) 3 Cal.5th 1216, 1226, quoting *People v. Chun* (2009) 45 Cal.4th 1172, 1205.) Thus, "we apply the *Chapman* standard [citation] to evaluate an instruction that improperly defines an element of a charged offense." (*Stutelberg, supra*, 29 Cal.App.5th at p. 319; *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*); *People v. Brown* (2012) 210 Cal.App.4th 1, 12-13.) Under *Chapman*, an instructional error must result in reversal unless it appears beyond a reasonable doubt that the error did not contribute to the verdict. (*Stutelberg*, at p. 319.)

Applying *Chapman* to the assault charge and the enhancement reveals harmless error. The prosecutor's argument seemed to point to the object Smith used as inherently deadly or dangerous because he said, "a deadly weapon is any object, instrument, or weapon that is inherently deadly or dangerous. A machete is deadly or dangerous." However, he also discussed how swinging the machete at Raymond's head and neck area would directly and probably make the machete hit him in the head. And he explained that Smith used the machete to "actually appl[y] force. He cut deep into [Raymond]'s arm." Thus, he discussed the manner of use in his closing argument.

Moreover, the evidence and testimony indicated that Smith's manner of use was deadly or dangerous. He used the machete to slice through all the layers of Raymond's arm, including the muscle. Using a machete to slice a victim undoubtedly qualified as using it "in such a way that is capable of causing and likely to cause death or great bodily injury," as demonstrated by Raymond's injury here. (CALCRIM Nos. 875, 3145.) Had the jury been provided only the "deadly or dangerous as used" theory and not the inapplicable "inherently deadly weapon" theory, as would have been preferable here, there is no reasonable probability the outcome would have been different. Thus, the instructional error was harmless beyond a reasonable doubt.

DISPOSITION

The judgment is affirmed.

HUFFMAN, Acting P. J.

WE CONCUR:

NARES, J.

AARON, J.